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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1927

No. 229

LUCY B. BROOKE, *Petitioner,*

vs.

CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

## PETITION FOR REHEARING

CITY OF NORFOLK,
R. W. PEATROSS,
A. PLUMMER PANNILL,
W. I. GILKESON.

COMMONWEALTH OF VIRGINIA,
E. WARREN WALL, *Counsel, Department of Taxation, of Counsel.*

Richmond, Virginia,
May 16, 1928.

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## PETITION FOR REHEARING

To the Honorable, the Chief Justice, and the Honorable, the Associate Justices of the Supreme Court of the United States of America.

Your petitioners, the City of Norfolk, R. W. Peatross, A. Plummer Pannill, W. I. Gilkeson, and the Commonwealth of Virginia, respectfully represent unto Your Honors that they are aggrieved by a judgment entered by this Honorable Court on, to-wit: the 23rd day of

April, 1928 in the above styled case, and your petitioners pray that a rehearing of the said case be granted, or if this Honorable Court deems it improper to grant a rehearing in the said case that certain amendments to the opinion of the Court may be made as will be hereinafter mentioned.

## GROUNDS FOR REHEARING

### POINT ONE

Your petitioners respectfully show that there are certain statements in the opinion of this Honorable Court which, although contained in the record and constitute a part of the allegations made by the petitioner in her petition before the Corporation Court of the City of Norfolk, and since there is a stipulation in the record, page 21, that the Commissioner of Revenue and Examiner of Records, two officers making the assessment testifid that the *matters and things* set up in the petition were true, but in their opinion the conclusion sought to be drawn from the said *facts* by the plaintiff were incorrectly drawn; were never intended to be stipulated as *facts* admitted to be true but on the other hand were intended to be stipulated as *conclusions of law* sought to be drawn from the facts by counsel for the plaintiff; it being expressly stipulated that in the opinion of the witnesses for the Commonwealth their conclusions of law were incorrectly drawn.

In the record of *Maguire* v. *Trefry,* 253 U. S. 12 almost identic allegations and stipulations are found (Record that case pp 1-5 and 10).

The statements in the opinion of this Court adverted to above are as follows:

"The assessments complained of were for city and state taxes upon the corpus of the trust fund." This statement is found in the record in pages 13 and 18.

"The property held in trust has remained in Maryland and no part of it is or ever has been in Virginia." This statement is found in the record in pages 12 and 17.

"The assessment is a bare proposition to make the petitioned pay upon an interest to which she is a stranger."

This proposition is stated in slightly different verbiage in the record in pages 13 and 18. The statement in the record being as follows:

"That, as will appear from said Item 17 of the said will, the undersigned has no vested interest in the property passing thereby."

While it is true that all the foregoing statements are contained in the allegations of the petition filed in the Corporation Court of the City of Norfolk, and while it was stipulated in that Court that all the *facts* alleged in the petitions were true, the foregoing statements were regarded and treated in the Corporation Court of the City of Norfolk and in the Supreme Court of Appeals of Virginia not as statements of fact stipulated to be true, but as conclusions of law drawn by counsel for the petitioner,

which conclusions of law were denied by witnesses for Commonwealth of Virginia.

The true facts in the case at bar were that the petitioner, who had been and was then a resident of the State of Virginia, was the beneficiary enjoying the entire income for life from a trust fund created by a will of a citizen of Maryland who named the Safe Deposit and Trust Company of the City of Baltimore as trustee to pay the net income from the trust fund to the petitioner for life, then to her daughters for their lives, and, upon the death of the last surviving daughter to divide the principal between the descendants then living of the daughters per stirpes. It is true that whatever investments were made from the proceeds of this trust fund were held and managed in Baltimore.

It clearly appears from these facts that the petitioner had a vested life estate in this trust fund, that the petitioner was a citizen of Virginia, resident in Norfolk. This equitable life estate in intangible personal property or choses in action is property within the State of Virginia, and further, that this equitable life estate, this beneficial interest must be the property or the thing which is taxed by the State under the Virginia law as construed by the Supreme Court of Appeals of this State in *Seldon* v. *Brooke,* 104 Va. 832, *Wise* v. *Commonwealth,* 122 Va. 693; and *Ellett* v. *Commonwealth,* 132 Va. 136, when such cases are given the construction which the Supreme Court of Appeals of the State of Virginia must have intended.

It, therefore, appears that the record in this case is

self contradictory in the three particulars mentioned above.

The following questions present themselves.

One. "Are the three statements above mentioned statements of fact which the record shows stipulated to be true, or, are they merely conclusions of law?"

Two. "If these statements are merely conclusions of law is this court bound by the construction of the Virginia law placed upon it by the Supreme Court of Appeals of this State?"

It is respectfully submitted that the said statements are not statements of fact, but are conclusions of law. If the State taxed the equitable life estate of Mrs. Brooke then the tax is not upon the corpus of the fund itself but upon her interest in it. If the tax is upon this beneficial interest then the property taxed is not in Maryland in contemplation of law, but is in Virginia at the domicile of the owner of the equitable life estate.

In *Wise* v. *Commonwealth,* 122 Va. 693-698 the Supreme Court of Appeals of the State of Virginia, said:

> "A gift to another for his life of the entire income and interest to be derived from a trust fund is a gift of a life estate in the fund. The quantity of the estate is the same, no matter by what name it is called, *and it is this quantity of estate to which the tax laws apply.* (Italics supplied.)

"In *Walker* v. *Hill*, 73 N. H. 254, 60 Atl. 1017, a devise to a wife of the 'Income of the remainder of my estate during her natural life' was held to give to the wife a life estate in the property. In *Little* v. *Coleman* 74 N. H. 215, 66 Atl. 483 there was devised to one daughter 'the use of my farm Vassalborough' during the term of her natural life, and to other daughters 'the income from all the rest and residue of my real estate and personal property' during the term of their natural lives, and in each case it was held that the devises constituted life estates in the property. The question seems to have been passed upon quite often in Tennessee, though it was not always necessary to the decision of the case. We quote from one of the late cases. In *Johnson* v. *Johnson*, 92 Tenn. 559, 23 S. W. 114, 22 L. R. A. 179, 36 Am St. Rep. 104, it is said: 'We are of the opinion that if the devise is valid, then the item passes the fee in the property for the purposes indicated, the net income from which is to be expended and appropriated by the trustees. While there is no specific devise of the property, yet a devise of the rents and profits and income is, in effect, a devise of the property itself. *Polk* v. *Faris*, 9 Yerg. Tenn.) 241 (30 Am. Dec. 400); *Morgan* v. *Pope*, 7 Cold (Tenn.), 547; *Davis* v. *Williams*, 85 Tenn. 648, 4 S. W. 8; *Pilcher* v. *McHenry*, 14 Lea (Tenn.), 88; 1 Jarm. Wills, 152, note; 3 Washb. Real Prop. 529, 530; *Spofford* v. *College* (Jan., 1889).'"

If Mrs. Brooke is the owner of a vested equitable life estate in the fund, and the tax is upon that interest, then

the assessment is not a bare proposition to make the petitioner pay upon interest to which she is a stranger.

It is respectfully submitted that the case at bar, in fact, presents no different question from that passed upon by the Supreme Judicial Court of Massachusetts, February 27, 1896 in *Hunt* v. *Perry*, 165 Mass. 287. This is admitted by counsel for Mrs. Brooke in their reply brief, page 5.

It will be further shown herein (p. 16 *et seq.*) that the question here presented has been answered favorably to the position of the Commonwealth by this Honorable Court in *Maguire* v. *Trefry*, 253 U. S. 12.

The facts in *Hunt* v. *Perry* are set out in 165 Mass. on page 288. It appears that the beneficiaries in that case were the widow and sons of Wm. S. Perry, who, being then an inhabitant of Brunswick in the State of Maine, died on April 8, 1873, leaving a will which was duly admitted to probate in that State. Under the terms of the will, the property upon which the taxes for the collection of which these actions were brought were assessed was given in trust to, and the legal title to it was vested in, Wm. L. Putnam of Portland and Galen C. Moses of Bath, both in the State of Maine. By the terms of the trust, the widow was entitled to one-third of the net income and each of the two sons to one-fifth of the remaining two-thirds of the net income of the trust property. The defendants moved from Maine to Braintree after the death of the testator, and had lived in Braintree for several years prior to 1893. No return was made by

any of the beneficiaries as to their taxable property, and the assessors of taxes of Braintree got their information for making the assessment in question from certified copies of the will, and from the accounts of the trustees filed in Maine. None of the trust property was at any time during 1893 within the Commonwealth of Massachusetts. The court said:

> "Upon the tax-book or valuation-book of the assessors, under the title 'Names of persons assessed,' appeared the names of the three defendants; under the title 'Description of taxable property' appeared the following: 'Morts. $87,000, Bonds, &c. $86,000; and under the title 'Tax' appeared one sum, $2906.40."

A reassessment was subsequently made whereby each of the three defendants was assessed separately upon the respective shares of the fund in question. To all appearances this assessment was against the beneficiaries and they were then taxed with the corpus of the property itself. Under the law in effect in the State of Massachusetts beneficial interests like these were subject to taxation.

The Court said:

> "The statute under consideration rests on the ground that the cestuis que trust residing here have a beneficial interest in the trust fund which is valuable, and that they are in effect the equitable owners thereof. An interest of this kind is property, which the Legislature may subject to taxation. *Bates* v.

*Boston,* 5 Cush, 93; *Williston Seminary* v. *County Commissioners,* 147 Mass. 427; *Hathaway* v. *Fish,* 13 Allen, 267.

In *Anthony* v. *Caswell,* 15 R. I. 159, cited by the defendants as in point, the statute contained no such provision as that above copies.

The defendants contend that the statute, if such is its true construction, is unconstitutional. This argument rests on the ground that the property is situated out of the State; that the beneficial interest of a cestui que trust is nowhere else made taxable; and that this statute selects for taxation a kind of interest not otherwise taxable, and so impose a tax which is disproportionate. This argument, however, is met by the suggestions already made, that the cestui que trust is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and allowed elsewhere, does not take away the power of the Legislature to subject the interest of the cestuis que trust to taxation here, if they live here. There is no more reason for holding this to be beyond the power of the Legislature than there would be for holding the taxation of *cattle and sheep, of manufactured goods,* or of shares in corporations untaxable here because situated out of the State." (Italics supplied).

On account of the fact that the italicized words in the last sentence quoted above with respect to tangible chattels has been shown by this Honorable Court not to be the

law, it has been intimated that the authority of the doctrine of *Hunt* v. *Perry* has been diminished. It is submitted, however, with all confidence that subsequent cases decided by this court have shown only the above mentioned *dictum* with respect to chattels to be incorrect. The real *doctrine* of the case has been substantially affirmed by this court.

In *Maguire* v. *Tax Commissioner*, 230 Mass. 503, there was again presented to the Supreme Judicial Court of Massachusetts the question of the authority of the State to tax the beneficial owner of a trust fund where that fund was held by a non resident trustee. It is true that in this later case the tax was measured by the annual value of the trust rather than its absolute value.

The court said in this case:

> "It is plain that if the intangible property, legal title to which is held by the trustee in Pennsylvania, were owned in absolute ownership by the cestui que trust resident here it legally would be taxable to her here. That is settled so far as concerns the Constitution of this Commonwealth, by *Hawley* v. *Malden*, 204 Mass. 138, and the many cases there collected, and so far as the Federal Constitution is concerned, by the same case on writ of error in 232 U. S. 1. The question, whether the nature of the right of a cestui que trust in a trust held in a sister State is such as to be subject to taxation here, was before this court in *Hunt* v. *Perry*, 165 Mass. 287. In that case the beneficiary of a trust fund, created under the will of a deceased resident of Maine, held in that

State by trustees there resident and appointed by its courts, was taxed as a resident of the Commonwealth for her interest in the trust. It was said by Allen, J., speaking for the court (p. 291): "The statute under consideration rests on the ground that the cestuis que trust residing here have a beneficial interest in the trust fund which is valuable, and they are in effect the equitable owners thereof. An interest of this kind is property, which the Legislature may subject to taxation. *Bates* v. *Boston*, 5 Cush. 93; *Williston Seminary* v. *County Commissioners*, 147 Mass. 427; *Hathaway* v. *Fish*, 13 Allen, 267 . . . The defendants contend that the statute, if such is its true construction, is unconstitutional. . . This argument, however, is met by the suggestions already made, that the cestui que trust is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and allowed elsewhere, does not take away the power of the Legislature to subject the interest of the cestuis que trust to taxation here, if they live here." Other expressions are used in the course of that opinion, some of which cannot stand in the light of decisions of the United States Supreme Court in *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *Delaware, Lackawanna & Western Railroad* v. *Pennsylvania*, 198 U. S. 341; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385, all rendered since *Hunt* v. *Perry*. But it does not seem to us that the soundness of the ground of that de-

cision stated in the words quoted has been shaken by subsequent decisions. The exception to the general principle that personal property is taxable at the domicile of the owner seems to be rather strictly confined to chattels, live stock and other property which possesses a visible corporeal existence and which have acquired a manifest and permanent situs in another state. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63. These decisions of the United States Supreme Court relied on by the petitioner do not appear to us to have wrought such ruin with the long established practice as to taxation in this Commonwealth as she contends. Indeed the soundness of the reasoning of the opinion in *Hunt* v. *Perry*, 165 Mass. 287, already quoted, appears to us to be sustained in principle by the most recent pronouncement of that court upon the subject in *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54."

That case came by writ of error to this court and was affirmed on April 26, 1920, under the title of *Maguire* v. *Trefry*, 253 U. S. 12. This court said:

"It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and interest distinct from its legal ownership. "The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others." 2 Story's Equity

(11th Ed.) 964. It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject matter of the tax under the statute of Massachusetts.

The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the state. *The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the state which are held taxable at the domicile of the owner. Kirtland* v. *Hotchkiss,* 100 U. S. 491, 25 L. Ed. 558. (Italics supplied.)

We find no error in the judgment and the same is affirmed."

It is clear, therefore, that the Supreme Judicial Court of Massachusetts was of the opinion that *Maguire* v. *Trefry* presented the same question passed upon in *Hunt* v. *Perry;* and further, that court was of the opinion that *Hunt* v. *Perry* was sustained by the decision of this court in *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54.

This court in its opinion in *Maguire* v. *Trefry, supra* did not mention *Hunt* vs. *Perry, supra,* certainly it made no attempt to distinguish it from the case then in hand. Indeed, the court concurred with the Supreme Judicial Court of Massachusetts in thinking that the *Fidelity &*

*Columbia Trust Co.* v. *Louisville*, 245 U. S. 54, was in point. The court further said that *Maguire* v. *Trefry, supra,* presented no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the State which are held taxable at the domicile of the owner. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558.

It is therefore plain since *Fidelity & Columbia Trust Co.* v. *Louisville, supra,* involved the question of property taxes upon intangible personal property, that this court does not regard the taxation of income from intangible personal property as involving a difference in principle from the taxation of the property itself.

It is therefore believed that in *Maguire* v. *Trefry, supra*, this Honorable Court has substantially affirmed the doctrine of *Hunt* v. *Perry, supra.* A careful examination of the authorities does not disclose any criticism by any court of the doctrine of *Hunt* v. *Perry, supra.* That case has been assumed by a majority of the States of the Union to have been the law for more than thirty-two years. The legislative branches of the several States have framed their tax laws upon the theory that *Hunt* v. *Perry* was sound. An examination of the laws and the reports of the taxing authorities of the several states indicate that twenty states impose a tax upon trust funds in accordance with the residence of the beneficiary. That is to say they tax the beneficial interest in the trust fund to the resident beneficiary, even though the trustee be a nonresident and the fund itself be held outside of the State. The States which apply this doctrine are as follows:

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|---|---|
| Arizona | Kentucky |
| California | Maryland |
| Colorado | Minnesota |
| Connecticut | Missouri |
| Georgia | North Carolina |
| Idaho | Oklahoma |
| Illinois | Oregon |
| Indiana | Vermont |
| Iowa | Virginia |
| Kansas | West Virginia |

Thirteen States and the District of Columbia impose taxes upon trust funds strictly in accordance with the residence of the trustee alone. These States are:

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| Arkansas | Ohio |
| District of Columbia | Pennsylvania |
| Maine | Rhode Island |
| Michigan | South Carolina |
| Montana | South Dakota |
| Nebraska | Texas |
| New Jersey | Utah |

Seven States have substituted an income tax for the property tax upon all intangible property which includes trust funds held by non-resident trustees for the benefit of resident beneficiaries. These States are:

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| Delaware | New York |
| Massachusetts | North Dakota |
| Mississippi | Wisconsin |
| New Hampshire | |

Eight States do not seem to assess any tax either upon intangible property or the income therefrom when such intangible property is owned outright, or is held in trust, either by a resident or non-resident trustee for the benefit of either a resident or non-resident beneficiary. These States are:

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| Alabama | New Mexico |
| Florida | Tennessee |
| Louisiana | Washington |
| Nevada | Wyoming |

It is submitted that this Honorable Court should be very reluctant to declare unconstitutional a part of the tax system of twenty of the States, and it should take this step only in case it feels impelled to do so by a plain mandate of the Federal Constitution.

## ANALYSIS OF MAGUIRE V. TREFRY

Lest the concatination of ideas which we have advanced seem too attenuated, let us consider the exact point decided by this Court in *Maguire* v. *Trefry,* 253 U. S. 12, and let us consider the same case below in 230 Mass. 503.

The facts disclosed by the record in *Maguire* v. *Trefry, supra,* are almost identical with the facts in the case at bar. The facts in that case were that Mrs. MacArthur, a resident of Philadelphia, created a trust for the benefit of her four children, one of whom was Mrs. Emily M. Maguire. The will of Mrs. MacArthur was probated in the Orphans Court of the County of Philadelphia in the State of Pennsylvania. The Girard Trust Company, the

trustee, held all the physical symbols representing the intangible personal property in Pennsylvania at all times. No part of the said physical symbols ever came into the State of Massachusetts. Mrs. Maguire was paid her share of the income from the Trust fund by cheques mailed from Philadelphia, Pennsylvania, to Cambridge, Massachusetts, (Record pages 1, 2, and 3). This was a spendthrift trust (Record page 7). Mrs. Maguire had no right to assign, alienate, or anticipate any of the income from the Trust fund (Record page 7). It is true that she had the power of appointment which she was permitted to exercise by will. If this power of appointment was not exercised by her, then her share of the trust went by limitation to her children or to others in the event she died without issue. Thus Mrs. Maguire had only an equitable life estate in a spendthrift trust with the power of appointment. In the case at bar, Mrs. Brooke has an equitable life estate in a non-spendthrift trust with full power of assignment, alienation or anticipation, and without the power of appointment, as the limitations over are fixed by the instrument creating the trust.

However, we search the opinion of the court in vain for any intimation that the power of appointment enjoyed by Mrs. Maguire had any bearing upon the taxability of her equitable life estate.

## NATURE OF THE MASSACHUSETTS INCOME TAX.

That the Massachusetts income tax sustained by this court in *Maguire* v. *Trefry, supra,* was not an excise tax but was a property tax is made clearly to appear from

the record. The Supreme Judicial Court of Massachusetts decided this question plainly and positively. The court said in this connection (Record, page 21), 230 Mass. 512.

> "The *cestui que trust* has important legal rights respecting the trust fund which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or irrational procedure. They attach to her person wherever she goes. One of these is the right to receive the income. That is a property right. The income when received is property. *The tax here in question is a property tax.* (Italics supplied.) *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 531, 532."

In the later case, the Court said:

> "The question was somewhat argued at the bar whether the tax authorized by the Forty-fourth Amendment and levied by the instant statute is wholly a property tax, as was said in *Opinion of the Justices*, 220 *Mass.* 613, 623, 625, *Perkins* v. *Westwood*, 226 *Mass.* 268, *Pollock* v. *Farmers Loan & Trust Co.* 157 *U. S.* 429, 581; *S. C.* 158 *U. S.* 601, or whether in some aspects and applications it may be an excise, *Springer* v. *United States*, 102 *U. S.* 586, 702 *Brushaber* v. *Union Pacific Railroad* 240 *U. S.* 1, 16, 17, *Flint* v. *Stone Tracy Co.* 220 *U. S.* 107, 150, 152, *Glasgow* v. *Rowse*, 43 *Mo.* 479, 491, *Waring* v. *Mayor & Alderman of Savannah*, 60 *Ga.* 93, 100 *Drexel & Co.* v. *Commonwealth* 46 *Penn. St.*

31, 40. It is not necessary to do more than to refer to 220 Mass. 623-627."

Wherein it was said:

"The second question has two branches. The first is, whether a duty or excise may be levied upon incomes derived from intangible personal property, including interest on debts of every kind and dividends on corporate stocks; the second refers to an excise upon income derived from professions, trades and employments. The bill to which this question relates, Senate Document No. 438, provides in substance for the assessment of an 'excise duty of six per cent of the amount of—income arising or accruing during each calendar year from debts of every description and from stocks of all corporations, domestic or foreign. These classes of personal property are exempted from other taxation, and there are further details as to exemptions—and the collection and distribution of the 'excise duty'. These provisions of the proposed bill constitute a selection of specific articles of property to be assessed by themselves at an unvarying rate, differing from the rate which is assessed upon other property. It is the arbitrary designation of a certain class of property without reference to any rule of proportion and without regard to the relative share of public charges, which it should bear as compared with that borne by other property and without regard to any special benefit accruing to the selected property. Manifestly it is not and does not purport to be a pro-

portionate tax. It cannot be sustained as tax on property, which must be proportional. *Portland Bank* v. *Apthrop,* 12 *Mass.* 252, 255, *Cheshire* v. *County Commissions,* 118 *Mass.* 386, 389. *Gleason* v. *McKay,* 134 *Mass.* 419, 424. Plainly it is laid as an excise. Such an imposition cannot be sustained under the clause of the Constitution relating to excises. A tax upon income from money on deposit or at interest, from bonds, notes or other debts due, and as dividends from stocks, coupled with exemption from all other taxation of the principal from which such income flows, is in substance and effect a tax upon the property from which it is derived. A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be changed by calling it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property. This was decided after most elaborate consideration, with affluent citation of authorities, in *Pollock* v. *Farmers Loan & Trust Co.* 157 *U. S.* 429, 581, *S. C.* 158 *U. S.* 601. We do not need to review that ground or to re-state the arguments in its support. It follows that a tax upon such income is a property and not an excise tax. This point is covered also by *Opinion of the Justices,* touching the so-called three-mill tax, reported in 195 Mass. 607. We adhere to the principles there stated and to the conclusions there reached.

To the same effect see *Opinion of the Justices*, 77 N. H. 611. It is necsary to answer the first branch of this question in the negative."

In this case, the Court said further: (Page 627)

"As has been pointed out in answer to the second question, a tax upon the income of property is a tax upon the property itself."

The Supreme Judicial Court of Massachusetts having thus decided that the Massachusetts substituted income tax is a tax upon the property itself, and this Court, being bound by that decision, having affirmed the right of the Commonwealth of Massachusetts to impose this property tax upon the equitable life estate owned by the citizen of Massachusetts, and held in trust by a foreign trustee, it is not perceived how any different Federal question can be presented, if the property tax is measured by the value of the property or by the capitalized value of the income rather than by the annual income derived from the property. That the tax assailed in *Maguire* v. *Trefry, supra*, was a property tax and not an excise tax appears clearly from the record and from the briefs of both the plaintiff in error and the defendant in error.

And, it is respectfully submitted that since this Honorable Court accords the Commonwealth of Massachusetts the right to impose a property tax upon equitable life estates held by residents of the State of Massachusetts even though the physical symbols which represent the intangible personal property are permanently held outside the State by a non-resident trustee, no reason is perceived

why a similar right should be denied the Commonwealth of Virginia.

## WACHOVIA BANK & TRUST CO. V. DOUGHTON, DISTINGUISHED

In its opinion the court cites only one case to sustain the proposition that the Commonwealth of Virginia is forbidden by the Fourteenth amendment to impose taxes upon the equitable life estate in question. This case is *Wachovia Bank & Trust Co.* v. *Doughton, 272 U. S.* 567-575. A careful examination of the opinion of the court in that case seems to disclose the fact that the analogy between the case at bar and the *Wachovia Bank & Trust Co.* v. *Doughton, supra,* does not approach the analogy between the case at bar and the case of *Maguire* v. *Trefry, supra.* In the Wachovia case this court denied to the State of North Carolina the power to tax as a transfer the exercise of a power of appointment by the citizen of the State of North Carolina, which power of appointment was derived from the will of a citizen of the State of Massachusetts. The reason for this denial of authority to tax is very clearly stated by the court (272 U. S. 575).

> "Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power.' The appointee takes, not as the legatee of him who appoints, but of the original donor. 'Property in the hands of domestic trustees appointed under the will of a domestic testator who conferred a power of appointment upon a

> non-resident, must be distributed according to the law of this Commonwealth and . . . the execution of the power must be interpreted according to our law and in conformity to the power conferred.' *Walker* v. *Treasurer & Receiver General,* 221 Mass. 600, 602, 603, 109 N. E. 647, 648, and cases there cited; *Shattuck* v. *Burrage,* 229 Mass. 449, 118 N. E. 889."

For the above mentioned reason, it is thought that the *Wachovia Case* may be distinguished from *Bullen* v. *Wisconsin,* 240 *U. S.* 625. In the latter case, Bullen, a citizen of the State of Wisconsin established a trust fund for the benefit of his widow and children retaining a life interest. This trust fund was placd in the hands of an Illinois trustee. The practical effect of the creation of this trust was the making of a gift intended to take effect at the death of the donor. It was therefore clearly taxable as a part of the universitas of the donor, since it was his own property which he was giving away, while in the *Wachovia Case* the property donated was not that of a citizen of North Carolina but it was the property of a citizen of Massachusetts. Whatever may be said as to the possibility of reconciling the *Wachovia Case* with the *Bullen Case,* it is clear that neither of these cases has a direct bearing upon the case at bar, since both of these cases related to inheritance taxes and not to property taxation. It would hardly be questioned, we think, under the decision of this Court in *Maguire* v. *Trefry,* supra that the State of North Carolina had a right to tax Mrs. Taylor upon the value of her equal life estate as long as she lived, and that the State of Wisconsin would have had a right to tax Mr. Bullen upon his equitable life estate as long as

he lived, because in both these cases, the thing taxed was within the jurisdiction of the State imposing the tax. (See in this connection *Blodgett* v. *Silberman, et al.,* and *Silberman* v. *Blodgett,* Nos. 190 and 191, October term, 1927, decided April 16, 1928, in which the court said (page 6):

> "At common law the maxim 'mobilia sequenter personam' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to *intangible property, including choses in action,* without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the State of the domicile or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not." (Italics supplied.)

## DISTINCTION BETWEEN TAXES ON TANGIBLE AND INTANGIBLE PROPERTY.

In the case at bar an analogy sought to be drawn between the tax upon intangible personal property where the physical symbols representing it are located outside the state of the owner's domicile and tangible personal property so permanently located. That this analogy is not well founded is stated by this court in *Fidelity & Columbia Trust Co.* v. *Louisville, supra,* in which the Court said:

"It is argued that in a later case this Court has held the power of taxation not to extend to chattels permanently situated outside the jurisdiction although the owner was within it; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed 150, 4 Ann. Cas 493; and that the power ought equally to be denied as to debts depending for their valdity and enforcement upon a jurisdiction other than that levying the tax. But this Court has not attempted to press the principle so far and there is opposed to it the long established practice of considering the debts due to a man in determining his wealth at his domicile for the purposes of this sort of tax."

And in *Maguire* v. *Trefry, supra,* where it is said:

"To support this contention the plaintiff in error relies primarily upon the decision of this court in *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann Cas. 493. In that case we held that tangible personal property, permanently located in another state than that of the owner where it has acquired a situs, and was taxed irrespective of the domicile of the owner—was beyond the taxing power of the state, and that an attempt to tax such property at the owner's domicile was a denial of due process of law under the Fourteenth Amendment. This ruling was made with reference to cars of the Transit Company permanently employed outside the State of the owner's residence. In that case this court, in the opinion of

Mr. Justice Brown, speaking for it, expressly said that the taxation of intangible personal property was not involved. 199 U. S. 211, 26 Sup. Ct. 40, 50 L. Ed 150, 4 Ann. Cas 493."

## REASON FOR THE DISTINCTION BETWEEN TANGIBLE PERSONAL PROPERTY AND INTANGIBLES.

The reason for the distinction in the taxable situs of tangible and intangible property so luminously drawn by this Honorable Court in *Union Refrigerator Transit Co.* vs. *Kentucky*, 199 U. S. 194 is not far to seek. It is a distinction which leaps to the eye. Tangible personal property and real estate are *things*. They may be seen and touched and handled. They have a concrete existence in space. They may be measured with a yardstick. A debt on the other hand, an intangible right, is after all merely a mental concept. It is the agreement of two or more minds recognized by the universal conscience and consciousness of humanity. Though the debt may be reduced to writing, the writing is not the right. The writing may be inadvertently destroyed, the right remains. Being, therefore, simply a thought, and agreement between the mind of the debtor and that of the creditor that the debt exists, how can it be said that this thought has any situs of its own? Who can so transfix a thought or impale an idea that it may be brought into the bourne of space, give three dimensions length, breadth and thickness and definitely located in a place so that one may say "In this spot it actually is and has its being, he who would say otherwise is forbidden by the Federal Constitution?"

Only two theories of the law have been advanced for

giving a situs to simple debts. One is the theory that the debt takes its situs from the domicile of the debtor. This theory was disapproved by the court in *State Tax on Foreign Held Bonds* 15 Wall. 300. The other theory, universally recognized by all the courts up to the present moment, is that the doctrine of *Mobilia Sequenter Personam* applies and that the situs of the debt is the residence of the creditor.

It is true that this Honorable Court has recognized two departures from the law of *Mobilia Sequenter Personam*. First: In the case of Specialties as in *Wheeler* v. *Sohmer,* 233 U. S. 434, wherein it is said that a bond is something more than the mere evidence of the debt. It is the debt itself, and by a tradition that comes down to us from more archic conditions, the debt is inseparable from the paper which declares and constitutes it.

However, it is to be remembered in *Wheeler* v. *Sohmer,* supra the court seems to have been careful to recognize the principle that in so far as the state of the domicile was concerned this court would not deny to that state the right to tax the intangible upon the doctrine of *Mobilia Sequenter Personam,* no matter what right might exist touching taxation by the State wherein the bond was physically present.

This idea is fortified by the recent case of *Blodgett* v. *Silberman* and *Silberman* v. *Blodgett* (U. S.) decided April 16, 1928.

The other apparent exception to the rule arises in cases like *Metropolitan Life Insurance Co.* v. *New Orleans,* 205 U. S. 395, *Liverpool and London and Globe Insurance Co.* vs. *New Orleans,* 221 U. S. 346, 354 wherein this court has held that intangible property may be given

a business situs in a state other than the state of domicile to the end that such state of business situs may possess the right to tax the property. However, even in this class of cases as was clearly pointed out by this court in *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54 the exercise of this right by the state of business situs is nugatory in its effect in so far as this may be said to impair the right of the state of the domicile to tax.

As a result of the careful consideration of all the cases heretofore decided by this court, touching the right of the state of the domicile to tax intangible personal property, one reaches the ineluctable conclusion that the court has with respect to the domiciliary state always upheld the doctrine of *Mobilia Sequenter Personam,* and that whatever right of taxation may be acquired by other states, the right of taxation by the state of the domicile has never been seriously questioned.

In the case now at bar we have, as it were, two owners of the fund.

One: The Trust Company in Baltimore which holds the bare legal title.

Two: The real or beneficial owners. The petitioner who holds the life estate, her daughters who hold a life estate in remainder, and the children of the daughters who hold the remainder after the expiration of the two life estates. All these beneficiaries are residents and citizens of Virginia; therefore, the entire beneficial interest is held by citizens of this State.

Unless this Honorable Court is prepared to say that the Fourteenth Amendment requires the pursuit of the shadow and not the substance, unless it is to make taxation a matter of form and not of reality, unless it is pre-

pared to overturn *Hunt* v. *Perry*, and *Maguire* v. *Trefry*, *supra*, and to reverse the whole current of decisions which have gone heretofore, it is respectfully submitted that the Commonwealth of Virginia has a right to tax her citizens upon the beneficial interest which they hold in trust funds even though the bare legal title may be held elsewhere.

Since a majority of the states which have substituted the income tax for the property tax on intangibles, and a large majority of the states which have retained the property tax follow the rule that the tax should in all fairness be collected and enjoyed by the state in which the beneficial owner resides, and enjoys the fruition of the trust, along with the protection and advantags afforded by the laws of the State where he resides; if this court should now declare such domiciliary taxation to transcend the Constitution, the remarks of the Supreme Court of Appeals of the State of Virginia in *Wise* v. *Commonwealth*, 122 Va. 693, would become increasinly pertinent.

> "Citizens of this State can by creating foreign trusts deprive the State of a very large part of its revenue."

## REQUESTED AMENDMENT TO THE OPINION

### POINT TWO

In the event that this Honorable Court feels that it is bound by all the statements in the record in this case and that these statements are statements of *fact* which have been stipulated so that the Court does not feel at liberty

to consider the verity of the statement as to the tax complained of being upon the corpus of the trust fund, that the property taxed has remained in Maryland and no part of it has ever been in Virginia, and that Mrs. Brooke has no vested interest in the fund in question, then in that event the Commonwealth of Virginia respectfully requests this Honorable Court so to amend its opinion delivered on April 23, 1928, that it may be made plainly to appear that the decision of this case was purely and simply upon the record presented to the court, and that the wider question of the validity of the tax policy of the State of Virginia and nineteen of her sister states has not been passed upon and declared to be invalid.

The reason for this request is that while the case at bar is relatively unimportant, the amount of tax involved being insignificant, yet the principle of the right of the State to tax its citizens upon beneficial interests held by them in foreign trusts is of prime importance. Wide publicity has been given to the decision of the court in the public press of the State of Virginia, and the theory has been advanced that the entire tax policy of the State in this regard has been declared invalid.

The question of such taxability of such beneficial interest is a matter which frequently presents itself to the Department of Taxation of the State of Virginia, and the Department feels that it should be advised precisely whether this Honorable Court has decided the case at bar simply upon the record presented, or upon the question of the entire tax policy of the State in refrence to

taxation of beneficial interests held by residents in foreign trusts.

Respectfully submitted,

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Richmond, Virginia,
May 16, 1928.